



Frank R. Borchert
General Counsel, Senior Vice President
Chase Card Services

June 21, 2010

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: CG Docket No. 02-278
REPLY COMMENTS OF JPMORGAN CHASE & CO.

JPMorgan Chase & Co., on behalf of Chase Bank USA, N.A., JPMorgan Chase Bank, N.A. and its other subsidiaries (collectively "JPMC"), hereby submits its Reply Comments ("Reply") in connection with the Commission's Notice of Proposed Rulemaking ("NPRM") on proposed amendments to its regulations implementing the Telephone Consumer Protection Act ("TCPA").¹

I. Expert Federal Agencies and a Broad Cross-Section of U.S. Industry Overwhelmingly Oppose the NPRM's Express Written Consent Requirement for Non-Solicitation Calls from Automated Telephone Dialing Systems to Wireless Numbers

In its comments, JPMC expressed its support generally for the Commission's efforts to harmonize its TCPA rules with the Federal Trade Commission ("FTC") Telemarketing Sales Rule ("TSR"). The vast majority of commenters did so as well or did not take issue with this principal objective. However, the Commission should not extend the proposed written consent requirement to non-solicitation calls from automated telephone dialing systems (hereinafter "autodialers") to wireless numbers.² Doing so would negatively and unreasonably interfere with the ability of consumers to communicate with their financial institutions and so to manage their financial affairs.³ The comments submitted by or on behalf of other financial institutions,

¹ See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, CG Docket No. 02-278, FCC 10-18 (rel. Jan. 22, 2010) ("NPRM").

² See *id.* at ¶ 20 (citing U.S.C. § 227(b)(1)(A)(iii)).

³ See, e.g., Federal Reserve Board Staff at 3 (noting that autodialers are used "to alert consumers when their account balance is low or a payment is due or past due to help consumers avoid the assessment of fees"); *id.* at 4 (requiring "use [of] live representatives to manually place calls ... could inhibit an institution's ability to reach consumers in certain

including mortgage lenders, student lenders, insurance companies, thrifts, community banks, regional banks, large financial institutions like JPMC, and their trade associations, reveal widespread support for JPMC's position and underscores the potentially sweeping negative ramifications of the Commission's proposal for the financial services industry.⁴

The Commission should particularly take heed of the concerns raised by the Federal Reserve Board staff, U.S. Department of Education, and U.S. Department of the Treasury Financial Management Service regarding the impact of the *NPRM* proposal on the regulatory programs they administer under federal law.⁵ JPMC and many other industry commenters echo these concerns, explaining that today's automatic dialing technologies are used for a vast number of important federal and state regulatory compliance purposes.⁶ These include:

- the time and anti-harassment restrictions contained in the Fair Debt Collection Practices Act;⁷
- the identity theft (Red Flags) provisions of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act");⁸
- Section 501(b) of the Gramm-Leach Bliley Act;⁹
- Breach notification laws of 46 states and the District of Columbia, including those of California, Florida, and New York;¹⁰

circumstances where a consumer might need the information as soon as possible (for example, in cases of suspected fraud or identity theft.")); *see also* JPMC Comments at 2-7, 11-13.

⁴ *See, e.g.*, JPMC Comments at 9-16; Comments of the Financial Services Roundtable, the American Bankers Ass'n, and the Consumer Bankers Ass'n at 4-17; Citigroup Comments at 1-4; Mortgage Bankers Ass'n Comments at 3-5; Progressive Group of Insurance Companies Comments at 5-8; Student Loan Servicing Alliance ("SLSA") Comments at 4-16; Wells Fargo Comments at 3-14; *see also* Bank of America Comments at 2-8.

⁵ *See* Reply Comments of the Federal Reserve Board Staff, at 3-4; US Department of Education Comments at 1-2; US Department of the Treasury Financial Management Service at 1-3.

⁶ *See* JPMC Comments at 17-20; Financial Services Roundtable et al. Comments at 6-8, 11, 25-28; Mortgage Bankers Ass'n Comments at 2; Wells Fargo Comments at 19-20.

⁷ Financial Services Roundtable et al. Comments at 11 (citing to 15 U.S.C. §§ 1692-1692p); Wells Fargo Comments at 15 (same).

⁸ *See* Federal Reserve Board Staff at 4 (citing Section 605 of the Fair Credit Reporting Act, as amended by the FACT Act); JPMC Comments at 4-5 (citing Pub. L. 108-159, §§ 114, 315, 605A); *see also* Financial Services Roundtable et al. Comments at 6-7 (citing Pub. L. 108-159 § 605A and 15 U.S.C. § 1681c-1).

⁹ Federal Reserve Board Staff at 3-4; Financial Services Roundtable et al. at 6, n.6. (citing Pub. L. 106-102, 113 Stat. 1338, § 501(b)).

¹⁰ *See* Financial Services Roundtable et al. at 6, n.6 (citing Cal. Civ. Code § 1798.20, NY CLS Gen. Bus. § 899-aa, and Fla. Stat. § 817.5681).

- The Obama Administration's Home Affordable Mortgage Program;¹¹
- Notifying automobile insurance policyholders in advance of termination for failure to pay, in compliance with state notification requirements;¹²
- Housing and Urban Development and Veterans Administration loan servicing regulations;¹³
- U.S. Department of Education and student loan servicers' efforts to minimize student defaults under Title IV of the Higher Education Act;¹⁴
- The lender verification requirements of the USA PATRIOT Act;¹⁵
- The collection of non-tax debts by the Federal government;¹⁶ and
- State business regulations requiring notification to customers.¹⁷

The non-FCC regulatory implications thus go well beyond the Health Insurance Portability and Accountability Act ("HIPAA") issues expressly raised in the *NPRM*,¹⁸ and there is no public interest basis or statutory compulsion for the Commission to upend the many regulatory compliance regimes that fall outside its authority.

Moreover, concern regarding the potential harms extends well beyond the financial services industry. A broad, cross-industry consensus supporting JPMC's position is evident from a number of parties' comments. The telecommunications, newspaper, pharmaceutical, retail department store, technology provider, travel and debt collection industries, to name a few, all described the adverse impact of the *NPRM* proposal on businesses' ability to conduct normal business with customers, and shared JPMC's opposition to the proposed rule.¹⁹ With respect

¹¹ See Financial Services Roundtable et al. Comments at 8-9 (citing U.S. Dept. of the Treasury Supplemental Directive 10-02 (Mar. 24, 2010)); Mortgage Bankers Ass'n Comments at 2 (same).

¹² See Financial Services Roundtable et al. Comments at 9.

¹³ See Mortgage Bankers Ass'n Comments at 2, nn. 5-6 (citing 24 C.F.R. § 203.600 and 38 C.F.R. § 36.4850).

¹⁴ See U.S. Department of Education Comments at 2, n.2 (citing 20 U.S.C. § 1085(a)(2)); JPMC Comments at 6 (citing 34 C.F.R. §§ 682.411(c)-(n)); SLSA Comments at 8, 13 (same, and also noting impact of proposed rule on lender contact information provided in multiple OMB-approved Federal student loan forms).

¹⁵ See JPMC Comments at 4 (citing Pub. L. 107-56 § 326).

¹⁶ See US Department of the Treasury Financial Management Service at 1-2 (citing 31 U.S.C. § 3711, note).

¹⁷ See US Telecom Comments at 6 (citing NY CLS Gen. Bus. § 396-mm, Unlawful trial offers (Consol. 2010)).

¹⁸ See *NPRM* at ¶¶ 33-36.

¹⁹ See, e.g., ACA International Comments at 34-36; Medco Comments at 2-3; National Retail Federation Comments at 2-3; Newspaper Ass'n of America Comments at 12-15; Soundbite

to the debt collection industry in particular, the U.S. Department of the Treasury Financial Management Service cautions that the proposed rule, if adopted, would adversely affect the Federal government's ability to collect "billions of dollars of delinquent debt" through the use of select private collection contractors.²⁰

As numerous commenters indicated,²¹ imposing such a requirement now and reversing the *ACA Declaratory Ruling*²² would have far-reaching and negative consequences, and is not compelled by the TCPA. Less than three years ago, in the *ACA Declaratory Ruling*, the Commission held that the TCPA allowed autodialer calls to wireless numbers when customers provided the numbers, for instance, to creditors on a credit application. That decision was consistent with the TCPA then, and there is no suggestion in the *NPRM* otherwise. No compelling arguments in favor of imposing this requirement have been raised in the comments; indeed, comments supporting the proposed rule do so in passing, without acknowledging its broad implications for the *ACA Declaratory Ruling*.²³ The Commission should thus preserve the *ACA Declaratory Ruling* as it relates to obtaining prior express consent.

II. The Commission Should Reassess Its Interpretation of the TCPA's Autodialer Definition

The record in the proceeding underscores the compelling need for the Commission to reassess its expansive interpretation of the term "automatic telephone dialing system." As noted above, JPMC and a number of other commenters explain that today's automatic dialing technologies are used for important federal and state regulatory compliance purposes.²⁴ The record also confirms that many companies, including JPMC, use autodialers primarily, if not exclusively, to contact existing customers at the customer-provided number, not to randomly or sequentially call cell phones for telemarketing purposes.

Communications Comments at 2-12; Sprint Nextel Comments at 3-6; United States Telecom Ass'n at 2-6.

²⁰ See US Department of the Treasury Financial Management Service at 1-2.

²¹ See *supra* note 4.

²² See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 559 (2008) ("*ACA Declaratory Ruling*").

²³ See National Consumer Law Center Comments at 8-9 (expressing concern for autodialer calls by debt collectors subject to FDCPA); Gerald Roylance Comments at 12 (same); Michigan Public Service Commission Comments at 5-6; see also Consumer Litigation Group Comments at 2 (expressing "support [for] the new proposal tightening the existing regulations" and expressing concern for third party debt collector calls subject to 47 U.S.C. § 227(b)(1)(A)(iii)).

²⁴ See *supra* notes 7-17 and accompanying text.

The Commission's determination in its *2003 TCPA Order* that predictive dialers met the TCPA definition of automated telephone dialing system was primarily intended to prevent circumvention of the prohibition on autodialed calls in a manner that compromised the TCPA's pro-consumer and pro-privacy objectives.²⁵ In contrast, as numerous commenters have demonstrated, the Commission's interpretation now runs the risk of deterring the use of innovative technologies that enable companies to meet consumers' demands.

The Commission's overbroad interpretation of the TCPA's definition of automated telephone dialing system will, unless rethought, stymie the deployment and development of evolving automated dialing technologies.²⁶ To avoid such an outcome, the Commission should reassess its prior decisions and clarify that an automated dialing technology must actually use a random or sequential number generator to come within the TCPA definition. Thus, loading existing customer telephone numbers onto the equipment without the random or sequential generation and dialing capability activated would not be deemed the use of an autodialer.²⁷ At the least, the Commission should clarify that calls made using such technology are not autodialer calls for TCPA purposes where: (1) telephone calls to the caller's customer using the equipment in question are manually placed by a live operator; and (2) equipment used to place the call has the incidental capacity to dial automatically.²⁸

The Commission has expressed a willingness to reassess its application of the statutory definition in light of changes in technology and the development of autodialer technologies.²⁹ JPMC and other commenters have shown that technology developments can warrant an easing – not just a “ratcheting up” – of TCPA restrictions. The former is warranted here if the Commission is to place meaningful scope on the telephone dialing technologies potentially subject to the TCPA's autodialer restrictions.

²⁵ See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14091, ¶ 131 (2003) (“*2003 TCPA Order*”).

²⁶ See JPMC Comments at 17-20; Comments of the Financial Services Roundtable et al. at 25-28; SLSA Comments at 14-15; see also ACA International Comments at 49.

²⁷ See JPMC Comments at 19.

²⁸ See JPMC Comments at 19-20; see also Comments of the Financial Services Roundtable et al. at 28; ACA International Comments at 52-56.

²⁹ See e.g. *ACA Declaratory Ruling*, 23 FCC Rcd at 566, ¶ 13.

III. The Few Comments Supporting an Express Written Consent Requirement for Non-Solicitation Calls Fail to Address the Comprehensive Protections Provided by the FDCPA

The very few comments supporting an express written consent requirement for non-solicitation autodialer calls suggest that such calls can be abusive in a debt collection context.³⁰ This argument is a red herring. As the U.S. Treasury Department's Financial Management Service explains, "debt collectors are already subject to numerous federal and state consumer protection laws."³¹ In the Fair Debt Collection Practices Act ("FDCPA"), Congress specifically empowered consumers to stop any unwanted collection calls by third party debt collectors by merely notifying the debt collector in writing that the consumer wishes the third party debt collector to cease further communications with the consumer.³² Congress also provided consumers a private right of action for violations of the FDCPA, which includes the right to actual and statutory damages and also allows for class action litigation and attorneys fees.³³ Congress also provided the *FTC* with authority to enforce the FDCPA.³⁴ The Commission should not supersede this separate legal regime through a sweeping expansion of the TCPA.

The comments do not assert that the FTC has not been diligent in asserting its regulatory authority over third party debt collectors, nor do they cite to any evidence of widespread abuses of delinquent debtors by creditor financial institutions that would justify such a broad extension of the Commission's TCPA regulations. Congress has comprehensively addressed how debt collectors may communicate with delinquent consumers in the FDCPA. The Commission should not, under the rationale of harmonizing the TSR with its TCPA regulations, impose regulations on debt collection that already are comprehensively regulated by another agency. In no event, however, should the Commission reverse the *ACA Declaratory Ruling* with respect to lenders, such as JPMC, who (1) are in direct privity with their customers, and (2) obtained prior express consent directly from their customers through their provision of wireless numbers.

³⁰ See Consumer Litigation Group Comments at 2; National Consumer Law Center Comments at 7-9.

³¹ See US Department of the Treasury Financial Management Service at 2.

³² See 15 U.S.C. § 1692c(c); see also Wells Fargo Comments at 15-16 (noting that FDCPA and several other federal laws regulate financial services companies' communications with customers).

³³ 15 U.S.C. § 1692k.

³⁴ 15 U.S.C. § 1692l.

IV. Should The Commission Impose Prior Written Consent on Non-Telemarketing Autodialer Calls, It Should not Supersede Consents Lawfully Obtained Under Current Law and Should Provide at Least 18 Months to Implement the New Regulations

For all the reasons cited in JPMC's and others' comments, the Commission should not adopt a written express consent requirement for non-solicitation calls placed to cell phones using an autodialer. Such action would require a substantial reassessment of the terms of JPMC's (and presumably countless other businesses') future customer relationships and regulatory compliance regime, entail a comprehensive reconfiguration of its customer care, outreach and communications systems, and would preclude the distinct public interest and consumer benefits made possible by the *ACA Declaratory Ruling*.³⁵ Should the Commission adopt the proposed rule, however, the agency should, at minimum, both (1) "grandfather" express consent previously obtained in reliance on its *ACA Declaratory Ruling*, and (2) provide at least eighteen (18) months for businesses to implement the new regulation going forward, during which prior express consent methods permitted under current law may continue. Failure to adopt both provisions would upset justifiable consumer expectations and could be disruptive to companies' regulatory compliance efforts.³⁶

Invalidating existing consents would prove extremely disruptive to existing customer relationships. JPMC operates many consumer businesses, including retail deposit accounts, home mortgages, home equity lines, credit cards and auto loans. As described in its comments, consumers have voluntarily provided JPMC with their cell phone numbers on all these types of accounts and are accustomed to JPMC contacting them at those numbers with important information. These consents were lawful under the TCPA when obtained, and remain lawful under the statute, and there is no reason for those consents to be invalidated under a new written express consent regime.³⁷ There are also significant practical limitations to obtaining express written consent to call wireless numbers from JPMC's existing customer base.³⁸

³⁵ See Comments of the Financial Services Roundtable, et al. at 18-19.

³⁶ See Wells Fargo Comments at 19 (18 month period); see also Citigroup Comments at 5 (any new rule should apply "only on a prospective basis").

³⁷ Customers who wanted these contacts to end merely had to request that JPMC discontinue them. The fact that customers almost uniformly do not request discontinuation of these communications attests to the fact that consumers generally desire them. Discontinuing those contacts arbitrarily would upset customers' expectations, contrary to how they have become accustomed to receiving important account information.

³⁸ Although some JPMC retail businesses do interact with their customers in person, others, such as the credit card business, do not. Where a financial institution does not interact in person, obtaining responses from customers can be problematic, as financial regulators have recognized in other contexts. See e.g. 31 C.F.R. § 103.121(b)(2)(i)(C) (Final Rule Implementing

JPMC would need to take a number of costly and time-consuming implementation measures, for which a 12-month period is insufficient. JPMC would need to reconsider, and possibly redesign, how it complies with various federal regulations.³⁹ Additionally, the proposed disclosures around express written consent are detailed and would require JPMC's businesses to redesign their applications across all channels, such as paper and internet applications, to meet the Commission's disclosure requirements.⁴⁰ JPMC would also need to retrieve existing applications already in the marketplace (e.g., in local outlets) or ensure that those out there are no longer used.

Finally, JPMC will need to consider whether to accept applications over the telephone if the Commission introduces a written consent requirement. Such a requirement would require JPMC to design a method to ensure that the disclosures for express consent are E-Sign compliant.⁴¹ Further, the necessary changes are not limited to credit applications, but would need to be implemented across all channels where consumers can update their contact information, such as when a consumer changes wireless cell phone numbers and wants to provide the new contact number to JPMC. All of this would take time, especially if it is to be done in an orderly way so as to minimize disruption to consumers.

V. Conclusion

For the foregoing reasons and the reasons cited in JPMC's Comments, the Commission should (1) not adopt new rules restricting the manner of consent required for autodialed calls to wireless numbers, particularly calls made for non-solicitation purposes, (2) reassess its

Section 326 of the USA PATRIOT Act exempting credit card issuers from the requirement that certain consumer identifying information be obtained directly from the consumer and allowing issuers to obtain the information from reliable sources).

³⁹ For instance, text message fraud alerts to combat identity theft would not be nearly as effective a preventative tool if the pool of customers who could receive these alerts shrinks dramatically.

⁴⁰ The Federal Reserve Board staff expressed concern that requirements that compel financial institutions "to use live representatives to manually place calls ... could significantly increase costs for the institution and such costs would likely be passed on to consumers without corresponding consumer benefit." Federal Reserve Board Staff at 4.

⁴¹ If possible at all, it would likely be a cumbersome process requiring "beeps" or "tones" associated with certain consumer actions and confirmatory letters to consumers containing the cell phone number to which the consent relates.

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interpretation of the statutory autodialer definition, (3) not adopt rules that supplant the FTC's existing FDCPA regime, and (4) if the rule is adopted, grandfather existing consents and allow an 18-month implementation period.

Respectfully submitted,

/s/

Frank Borchert